75-2540

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 8 1975

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Agriculture
Department of Commerce
Department of Defense
Department of Health, Education, and Welfare
Department of Housing and Urban Development
Department of Interior
Department of Justice
Department of Labor
Department of State
Department of the Treasury
Department of Transportation
Agency for International Development
Central Intelligence Agency
Energy Research and Development Administration
National Aeronautics and Space Administration
U.S. Nuclear Regulatory Commission
U.S. Postal Service
Tennessee Valley Authority
U.S. Information Agency
Veterans Administration

SUBJECT: CSC proposed report on H.R. 2351 and H.R. 4249, identical bills "To amend title 5, United States Code, to guarantee to each employee in the competitive service who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than October 31, 1975.

Questions should be referred to Hilda Schreiber (395-4650) or to Ralph N. Malvik (395-4702), the legislative analyst in this office.

Naomi R Sweeney

Naomi R. Sweeney, for
Assistant Director for
Legislative Reference

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

Honorable David N. Henderson
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in further reply to your request for the views of the Civil Service Commission on H.R. 2351 and identical bill, H.R. 4249, "To amend title 5, United States Code, to guarantee to each employee in the competitive service who has completed the probationary or trial period, the right to a hearing, a hearing transcript, and all relevant evidence prior to a final decision of an agency to take certain action against such an employee, and for other purposes."

H.R. 2351 and identical bill H.R. 4249 state that "It is the purpose of this Act to guarantee to employees in the competitive service a prompt evidentiary hearing conducted by an impartial individual prior to his removal or suspension without pay."

Federal employees have long enjoyed statutory and regulatory rights which protect them against unwarranted and capricious actions to remove, reduce in grade or pay, or suspend without pay. A Federal employee currently in the competitive service cannot be removed, reduced in grade or pay, or suspended except for such cause as will promote the efficiency of the service; a Federal employee is entitled to receive written notice of a proposed adverse action at least 30 days before the action is effected; he is entitled to review all evidence relied upon by the agency in proposing the action; he must be given opportunity and a reasonable amount of official time to reply orally and in writing to the charges on which the action is based; except in situations in which an employee's retention on the job might be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, an employee must be kept in a duty and pay status during the notice period; an employee is entitled to a written decision which must consider his reply to the charges and must be made by an official who is at a higher level in the agency than the official who proposed the action; and if the action is effected, the employee has a right to appeal to the Civil Service Commission on both the merit and procedures of the adverse action. The Commission affords the employee a right to representation and to produce and cross-examine witnesses in a full hearing

before an impartial appeals examiner who determines whether appropriate procedures were followed and whether the action meets the legal criterion of efficiency of the service. The appeals examiner has authority to order retroactive correction. Finally, the employee has access to the Federal courts.

Few employees in the private sector have rights, procedural or otherwise, comparable to those provided Federal employees before adverse actions may be effected. Employees of private industry and business, if covered by a labor-management agreement which provides for grievance procedures, grieve a suspension or separation after, not before, the action has been taken by management.

"Due process" does not require a hearing prior to effecting an adverse personnel action. In the case of Arnett v. Kennedy (416 U.S. 134, 1974) Justices Powell and Blackmun balanced the interest of the Government (maintenance of employee efficiency and discipline) against the interests of the employee (continuance of his income) and concluded that a post-termination hearing satisfies the requirements of due process. Mr. Justice White expressed his belief that the statutory requirement of 30 days' prior notice and the right of a Federal employee to answer charges against him in writing satisfies the requirements of due process. Three other justices held that no additional procedural protections are required by the Constitution for Federal employees beyond those expressly provided by statute.

The Commission points out that the protections against arbitrary removal or suspension guaranteed to employees by statute, Executive order and regulation exceed those protections afforded employees outside the Federal service and fully satisfy the requirements of due process. Critics of the system believe that in some cases the protections go so far as to deter agency management from taking adverse actions in proper cases with the result that the efficiency of the service is impaired and accomplishment of the agency's mission impeded. While the Commission recognizes that any process may result at times in detriment to governmental efficiency, the pretermination hearing requirement in the bill would compound the risks of governmental inefficiency without a concomitant or substantially proportionate benefit to the employee interest that the proposals purport to protect.

H.R. 2351 and H.R. 4249 amend section 7501 and repeal subchapter II of chapter 75 and chapter 77 of title 5, United States Code. A sectional analysis and Commission comments follow:

Subsection 7501(a) generally covers all employees of the executive branch who have completed a probationary or trial period and prohibits any removal, suspension without pay, or reduction in rank or pay except for such

cause as will promote the efficiency of the service. The effect of this section is to:

- Extend the statutory coverage of the cause standard to nonpreference eligibles of the competitive service for reductions in rank or pay (section 7501 of title 5 now covers removals and suspensions without pay) and

- Extend the cause standard for removals, reductions in rank or pay, and suspensions without pay to nonpreference eligibles in the excepted service except for employees in the Postal Service and those whose appointments are required by statute to be confirmed by or made with the advice and consent of the Senate.

It means that preference eligibles in the Postal Service who now are protected by the cause standard will lose this protection and that all employees in the excepted service in the future may not be removed, suspended without pay, or reduced in rank or pay except for such cause as will promote the efficiency of the service.

The Commission has no objection to the extension of statutory coverage of the cause standard to reductions in rank and pay to nonpreference eligibles in the competitive service. This is now done by Executive order and CSC regulation. The Commission does object to a general coverage for employees in the excepted service. It seems inappropriate to require a cause standard, for example, for employees in Schedule C and non-career executive assignment positions. These positions are administratively excepted and are by definition positions of a confidential or policy-determining character in which incumbents serve only so long as they can maintain a personal and confidential relationship with the head of the employing agency.

Subsection 7501(b) covers individuals in the competitive service who have completed a probationary or trial period and whose removal or suspension without pay is sought. Thus:

- The employee coverage eliminates procedural rights now guaranteed to preference eligibles in the excepted service and

- The action coverage even for the competitive service is only for removals or suspensions without pay.

A demotion or reduction in pay is generally considered to be an action with a greater adverse effect on an employee than a short suspension without pay. The Commission fails to see the logic in (1) covering all suspensions and (2) failing to cover reductions in rank or pay.

Subsection 7501(b) guarantees procedural rights as follows:

(1) At least thirty days written advance notice including the reasons specifically and in detail for the proposed action;

(2) Receipt at the time of the notice of all statements, affidavits, investigative reports, and all other evidence relevant to proposed action;

(3) A hearing before a hearing examiner who shall be an attorney, representation by counsel, and opportunity to present evidence and cross-examine witnesses;

(4) A copy of the verbatin transcript; and

(5) A written decision by the hearing examiner stating the findings of fact and conclusions of law upon which the decision is based.

Comments on the procedural requirements of 7501(b).

Currently, an employee must have a reasonable time for answering the notice of proposed action personally and in writing. In a number of cases the agency now cancels the proposed action or imposes a lesser penalty after receiving and considering the reply. H.R. 2351 and H.R. 4249 eliminate the opportunity for the agency to change its mind based on such informal communication. We believe that a requirement for a formal hearing at this stage is disadvantageous to both the employee and the agency.

Currently, Commission regulations require the agency to make available to an employee against whom an adverse action is proposed all material relied on by the agency in proposing the action. Copies of this information are given to the employee on appeal. The language of the bills requires the agency to provide employees with "all statements, affidavits, investigative reports, and all other evidence relevant to the proposed action." (Underlining added.) This language is not only broad but imprecise. It would permit appellants to go on "fishing expeditions" in search of materials not relied on to support actions; it would encourage voluminous files containing unnecessary information; and it might conflict with statutory exceptions to the Freedom of Information Act, as amended, since the Government may have evidence which would not be in the best interests of the agency or the Government to use in an action. Also, some provisions should be made for the protection of confidential information. Either the agency should be permitted to delete identifying material and make it available or if that cannot be done, the agency should not use the information and the information should not be made available. In any event, information should not be furnished which would violate the Privacy Act of 1974. Moreover, the language of the bills appears

to require that the employee receive the official documents. The Commission believes that the present requirement that an agency make available all material relied on meets all requirements of due process and protects the interests of the agency and the Government. In no case should the official documents be given the employee. If an employee is to be furnished the documents, he should be given copies.

These bills provide for a hearing before a "hearing examiner" who is required to be an attorney. The bills mention no other qualifications and are silent on the method of selection. It is not clear whether the hearing examiner is to be an administrative law judge (formerly administrative law judges were called hearing examiners); whether he is to be a regular employee of and responsible to the agency; whether he is selected for a particular case and, if so, whether the employee has any part in the selection. Since there is no provision for regulatory authority to supplement the provisions of the bills, we assume that each agency would be free to define qualifications, select, determine relationships, and provide a standard for the hearing examiner. This would result in as many versions as there are agencies.

The Commission considers that a hearing examiner holds a highly important and responsible position and that he will be called upon to decide matters that are extremely sensitive and significant to both the individual and the agency involved in a case. The Commission believes that hearing examiners should be knowledgeable in personnel management and possess certain personal atributes such as integrity, impartiality, and discretion as well as the ability to obtain, organize and analyze facts and arrive at sound conclusions. Although a majority of the Commission's appeals officers are attorneys, we do not believe that a law degree and a license to practice law should be the sole requirement for a hearing examiner; nor do we believe that considerations of due process and equity require hearing examiners to be attorneys.

Despite the absence of definition of the qualifications, selection, relationship, and accountability of the hearing examiner, he is given final authority in any contested proposal to remove or suspend Federal employees. This raises a serious question of constitutionality. Section 2 of Article II of the Constitution vests the power of appointment (which includes the power to remove) in the President with the advice and consent of the Senate. It also authorizes Congress to vest by law the appointment of inferior officers in the President alone, the courts, or heads of departments. In addition to any question of constitutionality, we believe that it is unrealistic and unworkable to give the hearing examiner final authority to remove and suspend.

Subsection 7501(c) authorizes the hearing examiner to issue subpenas requiring the attendance and testimony of witnesses or the production of evidence. This authority is supported by the power of any district court to order compliance with the subpenas. The hearing examiner is not given authority to disallow requests for witnesses or production of evidence but presumably must issue subpenas whenever requested to do so by interested parties. The Commission believes that without some discretionary authority to disallow such requests, large numbers of witnesses on the same point (or witnesses not expected to give relevant testimony) would serve to prolong and delay decisions contrary to any concept of fairness. Since the hearing examiner is given authority to revoke a subpena on petition from the person receiving it whenever he determines that the evidence would not be relevant or is not adequately described, it appears to the Commission that it would be more economical of time to place the burden of relevancy on the party requesting the witness or evidence rather than on the person who receives the subpena. It should be noted that although the Commission's appellate officials do not have subpena power, they have experienced no significant problems in obtaining relevant evidence and witnesses from agencies.

Subsection 7501(d) provides that the examiner's decision is final as to findings of fact. The hearing examiner is, however, provided with no standard for reaching his decision, i.e., preponderance of evidence, substantial evidence, proof beyond a reasonable doubt, etc. In addition, it is not clear whether the hearing examiner would have the authority to make a decision concerning the imposition of the penalty. For example, could the hearing examiner decide that, because of extenuating circumstances, the penalty would not be imposed, or could he determine that a lesser penalty would be more appropriate? Currently, agencies frequently decide to impose a lesser penalty than the one originally proposed, or in some cases cancel the proposed action altogether. If the hearing examiner is not to have the authority to make a decision concerning the penalty, it appears to the Commission that this bill, if enacted, would result in more severe penalties than occur under present law and regulation.

As stated previously, subsection 7501(d) appears to take away the authority of the head of the agency to discipline employees and vests that authority in the hearing examiner. Findings of fact are final and conclusions of law are reviewed only on action brought by the individual against whom an adverse action is made (not the agency). The Commission believes that an equal right of review of conclusions of law should be provided for both the individual and the agency. Further, the bill provides that the individual may bring action in the U.S. district court for the district in which he resides, the district in which the decision was made, or in the District of Columbia. This range of court choice could invite shopping for the court most likely to give a favorable interpretation. Additionally, it is not clear whether

a request for court review would stay the adverse action. If so, according to present time schedules and given all the administrative procedures provided for in the bills, it might take several years for an agency to effect an appropriate adverse action during which time it must pay the salary of the employee and cannot expect much in return.

Subsection 7501(e) apparently provides that in negotiating a collective bargaining agreement the agency and the union are not bound by the procedural provisions of section 7501. Any procedural protections or lack thereof for Federal employees covered by such agreements would, therefore, depend on whatever was agreed to by the agency and the labor organization. Federal employees with like status would no longer be guaranteed the same minimum protections; some would have more and some less. The Commission questions the validity of this provision which in effect permits a collective bargaining agreement to supersede statutory provisions which would otherwise apply to Federal employees covered by it.

It should be noted that section 7501 makes no exception in the case of suspensions or removals in the interest of national security or in other emergency situations. The bill neither repeals section 7532 of title 5 nor exempts employees covered by section 7532 from the provisions of section 7501.

Also the bill does not provide for emergency procedures in situations when the retention of an employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public. This omission could be remedied if the executive branch were authorized to supplement by regulation the provisions of the statute.

The procedures of section 7501 appear to the Commission to be sufficiently formal as to necessitate the retention of legal counsel by the employee. The Commission has consistently felt that it should not be necessary for an employee to be forced to retain an attorney to represent him in order to receive a complete hearing and an impartial decision on an appeal. For that reason, CSC has conducted adverse action hearings in a relatively informal manner which does not require knowledge of the Administrative Procedure Act. We believe that an appeal from an adverse action is essentially an employee-employer dispute and that dependence on formal procedures would not serve the best interests of either the appellant or the agency.

In summary, the Commission strongly objects to the enactment of H.R. 2351 or the identical H.R. 4249. It does not believe that the elimination of an appellate hearing by an outside agency and its replacement by a pre-decision hearing before a hearing examiner authorized to make a management decision on a disciplinary action is in the best interest of the employee and the Government.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

Chairman